Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

Brief of Massachusetts, California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington as *Amici Curiae* in Support of Petitioners

---

MAURA HEALEY
Attorney General
JONATHAN B. MILLER*
GENEVIEVE C. NADEAU
AMANDA R. MANGASER
Assistant Attorneys General
COMMONWEALTH OF MASSACHUSETTS
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617)727-2200
Jonathan.Miller@state.ma.us
Counsel of Record

(Counsel continued on inside cover)

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Kamala D. Harris
Attorney General of California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, California 94244

George Jepsen
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106

Matthew P. Denn
Attorney General of Delaware
Carvel State Building, 6th Floor
820 North French Street
Wilmington, Delaware 19801

Karl A. Racine
Attorney General for the
District of Columbia
One Judiciary Square
441 4th Street, N.W.
Washington, D.C. 20001

Lisa Madigan
Attorney General of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601

Tom Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

Janet T. Mills
Attorney General of Maine
Six State House Station
Augusta, Maine 04333

Brian E. Frosh
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

Joseph A. Foster
Attorney General of
New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Hector H. Balderas
Attorney General of
New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504

Eric T. Schneiderman
Attorney General of New York
120 Broadway, 25th Floor
New York, New York 10271

Ellen F. Rosenblum
Attorney General of Oregon
1162 Court St. N.E.
Salem, Oregon 97301

Kathleen G. Kane
Attorney General of
Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Peter F. Kilmartin
Attorney General of
Rhode Island
150 S. Main Street
Providence, Rhode Island 02903

William H. Sorrell
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

Robert W. Ferguson
Attorney General of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATE INTERESTS IN MARRIAGE ARE ADVANCED BY INCLUDING SAME-SEX COUPLES 4

II. NO LEGITIMATE STATE INTEREST JUSTIFIES EXCLUDING SAME-SEX COUPLES FROM MARRIAGE 7

A. Excluding Same-Sex Couples from Marriage Harms Their Children 8

B. "Responsible Procreation" Does Not Justify Restricting Marriage to Different-Sex Couples 13

C. Federalism Considerations Do Not Justify Discrimination 15

D. Tradition Alone Cannot Save Discriminatory Laws 18

III. EQUALITY DOES NOT THREATEN THE INSTITUTION OF MARRIAGE 19

A. Allowing Same-Sex Couples to Marry Does Not Fundamentally Alter the Institution of Marriage 20

B. Allowing Same-Sex Couples to Marry Does Not Threaten States' Ability to Regulate Marriage 24

IV. NON-RECOGNITION INFLICTS UNIQUE INJURIES ON MARRIED SAME-SEX COUPLES NATIONWIDE 27

A. Singling Out Same-Sex Couples for Non-Recognition Stigmatizes Them and Their Families 28

B. The Practical Consequences of Non-Recognition Are Substantial 32

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Baker v. State,
744 A.2d 864 (Vt. 1999) 5

Bishop v. United States ex rel. Holder,
962 F. Supp. 2d 1252 (N.D. Okla. 2014) 21

Board of Trustees of University of Alabama v. Garrett,
531 U.S. 356 (2001) 14

Boddie v. Connecticut,
401 U.S. 371 (1971) 21

Christiansen v. Christiansen,
253 P.3d 153 (Wyo. 2011) 36

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) . . . . . *passim*

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 16

DeBoer v. Snyder,
973 F. Supp. 2d (E.D. Mich. 2014) 7, 11

DiStefano v. DiStefano,
401 N.Y.S.2d 636 (N.Y. App. Div. 1978) 10

Eisenstadt v. Baird,
405 U.S. 438 (1972) 13

Goodridge v. Department of Public Health,
798 N.E.2d 941 (Mass. 2003) 5, 6, 8, 13, 20

Griswold v. Connecticut,
381 U.S. 479 (1965) 13

Hall v. BNSF Railway Co.,
2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) 34

Heller v. Doe,
509 U.S. 312 (1993) 7, 18

Johnson v. Robison,
415 U.S. 361 (1974) 7

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014) 28

Lapides v. Lapides,
171 N.E. 911 (N.Y. 1930) 13

Lawrence v. Texas,
539 U.S. 558 (2003) 19

Loving v. Virginia,
388 U.S. 1 (1967) . . . . . *passim*

In re Marriage Cases,
183 P.3d 384 (Cal. 2008) 5, 13

In re Marriage of Cabalquinto,
669 P.2d 886 (Wash. 1983) 10

In re Marriage of J.B. and H.B.,
326 S.W.3d 654 (Tex. App. 2010) 36

Maynard v. Hill,
125 U.S. 190 (1888) 4, 5

Miller v. Lucks,
36 So. 2d 140 (Miss. 1948) 30

Minnesota v. Clover Leaf Creamery Co.,
449 U.S. 456 (1981) 22

Nevada Department of Human Resources v. Hibbs,
538 U.S. 721 (2003) 11

Perry v. Schwarzenegger,
704 F. Supp. 2d 921 (N.D. Cal. 2010) . . . 6, 11, 12

Plyler v. Doe,
457 U.S. 202 (1982) 22

Romer v. Evans,
517 U.S. 620 (1996) 15, 16, 19

Saenz v. Roe,
526 U.S. 489 (1999) 35

Schuette v. Coalition to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 16

Sosna v. Iowa,
419 U.S. 393 (1975) 1

Stanley v. Illinois,
405 U.S. 645 (1972) 11

Succession of Caballero v. Executor,
24 La. Ann. 573 (1872) 30

Troxel v. Granville,
530 U.S. 57 (2000) 11

Turner v. Safley,
482 U.S. 78 (1987) 13, 21

U.S. Department of Agriculture v. Moreno,
413 U.S. 528 (1973) 16

United States v. Guest,
383 U.S. 745 (1966) 35

United States v. Virginia,
518 U.S. 515 (1996) 11

United States v. Windsor,
133 S. Ct. 2675 (2013) ..... *passim*

United States v. Yazell,
382 U.S. 341 (1966) 20

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) 17

Whittington v. McCaskill,
61 So. 236 (Fla. 1913) 30

Zablocki v. Redhail,
434 U.S. 374 (1978) 13, 21

STATUTES

28 U.S.C. § 1738A 30

28 U.S.C. § 1738C 28

29 U.S.C. §§ 1001 *et seq.* 33

29 U.S.C. §§ 1161 *et seq.* 34

42 U.S.C. §§ 2000e *et seq.* 34

765 Ill. Comp. Stat. 305/4(c)(3) 13

N.Y. Est. Powers & Trusts Law § 9-1.3(e) 13

OTHER AUTHORITIES

Attorney General of Maryland, *The State of Marriage Equality in America* (2015) 16

Centers for Disease Control & Prevention, *Births: Final Data for 2013, Supplemental Tables*, 64 National Vital Statistics Report No. 1, (Jan. 15, 2015) 24

Centers for Disease Control & Prevention, National Vital Statistics System, *Divorce Rates by State: 1990, 1995, and 1999-2011* 23

Centers for Disease Control & Prevention, National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2011* 22

Centers for Disease Control & Prevention, National Vital Statistics System, *National Marriage and Divorce Rate Trends* 23

Constitutional Constraints on Interstate Same-Sex Marriage Recognition, 116 Harv. L. Rev. 2028 (2003) 30

Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61 (1996) 29

Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage*, PloS ONE, Vol. 8, No. 6 (June 11, 2013) 23

Larry Gordon, *A Record Number of Out-of-State Students Brings Windfall for UC System*, L.A. Times (Aug. 18, 2014, 1:11 AM) 32

Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, 102 Am. J. Pub. Health 285 (2012) 6

Peter Hay et al., *Conflict of Laws* (5th ed. 2010) . . 31

Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143 (2005) 29

Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 Quinnipiac L. Rev. 105 (1996) 30

Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. Pa. J. Const. L. 377 (2012) 29

Brian McKenzie, *Out-of-State and Long Commutes: 2011*, U.S. Census Bureau (Feb. 2013) 32

Christopher Ramos et al., *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples*, The Williams Institute, May 2009 9

Restatement (Second) of Conflict of Laws (1971) 29, 30

William M. Richman et al., *Understanding Conflict of Laws* (4th ed. 2013) 28

Carmen Solomon-Fears, Congressional Research Service, R43667, *Nonmarital Births: An Overview* (2014) 24

U.S. Census Bureau, *Calculating Migration Expectancy Using ACS Data* 32

U.S. Census Bureau, *Characteristics of Same-Sex Couple Households: 2013* 22

U.S. Department of Health and Human Services, AFCARS Report No. 21 (Sept. 29, 2014) 12

Richard G. Wight et al., *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 Am. J. Pub. Health 339 (2013) 6

INTERESTS OF *AMICI CURIAE*

Amici States Massachusetts, California, Connecticut, Delaware, the District of Columbia,[1] Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington file this brief in support of petitioners as a matter of right pursuant to Supreme Court Rule 37.4.

We submit this brief to support the right of same-sex couples to marry, to refute arguments made in defense of exclusionary marriage laws, and to demonstrate the harm that gay and lesbian couples suffer when their marriages are not recognized across state lines. *Amici* States have experienced the positive results of marriage equality. The institution of marriage is strengthened. Families are healthier and more secure when they share in the benefits, protections, and obligations that attend marriage. Communities are enriched when all citizens have an equal opportunity to participate in civic life.

Amici States recognize, of course, that domestic relations are "a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). In fact, two terms ago, many of us joined an *amicus curiae* brief in *United States v. Windsor*, 133 S. Ct. 2675 (2013), arguing that Congress had no authority to define marriage for purposes of federal law. But we also understand and embrace the constitutional guarantees of equal protection and due process that

---

[1] The District of Columbia, which sets its own marriage rules, is referred to as a State for ease of discussion.

circumscribe our police powers. Thus, based on our common goals of protecting families, strengthening communities, and eliminating discrimination, we join in asking this Court to reverse the decision of the court of appeals.

SUMMARY OF ARGUMENT

All States agree that marriage is a core building block of society. All States implement policies that encourage individuals to get and stay married in recognition of the fact that marriage provides stability for families, households, and the broader community; children are better off when raised by parents in loving, committed relationships; and state resources are conserved when spouses provide for each other and their children. On all of these points—and many more—all States are in accord. *Amici* States differ with respondents on whether including same-sex couples in marriage advances legitimate governmental interests. Based on our experience, we know that it does.

The justifications offered for excluding same-sex couples from marriage do not survive even the most deferential constitutional scrutiny. Children suffer when their families are denied the benefits, protections, and status afforded to married couples. The ability or desire to procreate has never been a prerequisite to marriage, and many couples who will not have children are permitted to wed. Different- and same-sex couples alike also model long-term, committed partnerships heading stable families. The remaining justifications for excluding same-sex couples—respecting the democratic process and

preserving tradition—cannot sustain discriminatory laws on their own.

Concerns about the consequences of marriage equality are also unfounded. Permitting same-sex couples to wed does not threaten the institution or States' ability to regulate. Pure speculation that the place of marriage in our society will be undermined—measured by fewer different-sex marriages, more divorces, or more children raised in nonmarital households—is flatly contradicted by the experience of *Amici* States. By any measure, civil marriage has flourished in States with marriage equality. It is likewise untrue that including same-sex couples weakens States' authority to impose reasonable regulations on marriage that do advance important governmental interests. The validity of other regulations does not depend on States' ability to discriminate based on the gender or sexual orientation of the spouses.

The fact that marriages of same-sex couples are not uniformly recognized throughout the country also inflicts significant harms. The practical consequences and indignities that result from non-recognition affect major life decisions by same-sex couples and their families, including about education, employment, and residency. These couples are also forced to incur expense and undergo cumbersome—and sometimes humiliating—legal processes to obtain protections their marriages should already afford. Given States' near-universal acceptance of all other marriages that are valid where celebrated, the categorical non-recognition of same-sex marriages has the purpose and effect of

codifying—for its own sake—a second-tier status that our Constitution does not permit.

Marriage is a central organizing feature of our society, conferring exclusive rights, protections, and obligations on married couples and their families. States promote marriage to ensure long-lasting bonds between spouses and to provide a solid foundation for the families they form together. Marriage is also an immensely personal commitment involving the most intimate and private aspects of life. Given the legal and personal significance of the relationship, this Court has repeatedly affirmed the fundamental nature of the right to marry. Likewise, the Court has protected the freedom to marry the partner of one's choice and the equal dignity of all married couples. Thus, the Constitution's guarantees of equal protection and due process require equal marriage rights for same-sex couples nationwide.

ARGUMENT

I. STATE INTERESTS IN MARRIAGE ARE ADVANCED BY INCLUDING SAME-SEX COUPLES

Well over a century ago, this Court described marriage as "a great public institution, giving character to our whole civil polity." *Maynard v. Hill*, 125 U.S. 190, 213 (1888) (internal quotation marks omitted). States have long valued marriage for its many benefits to individuals, households, and the community at large, and therefore have combined the personal commitment inherent in marriage with publicly recognized rights and obligations. Though the legal contours of civil marriage have changed

significantly since *Maynard* was decided, the central role of marriage in our society has remained fixed.

In the United States, civil marriage has always been authorized and regulated by state governments in the exercise of their police powers to serve many ends. In early America, the household formed by marriage was understood as a governable, political subgroup (organized under male heads) and a form of efficient governance. As a political unit, the household included not only the married couple and their children, but also extended family. The household later took on particular significance as an economic sub-unit of state governments, responsible for supporting all of its members.

Today, marriage continues to serve as a basic building block of society. Among other things, it creates economic and health benefits, stabilizes households, forms legal bonds between parents and children, assigns providers to care for dependents, and facilitates property ownership and inheritance. Marriage thus provides stability for individuals, families, and the broader community. *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999). States encourage marriage because these private relationships assist in maintaining public order. *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 954 (Mass. 2003).

The security of marital households creates a safety net that ensures that family members have support in a time of crisis, and limits the public's liability to care for the vulnerable. *In re Marriage Cases*, 183 P.3d 384, 423-24 (Cal. 2008). Marriage also provides couples with greater freedom to make decisions about education and employment, knowing that if one spouse

provides the primary economic support, the other will be protected, even in the event of divorce or death. As a result, married couples can specialize their labor and invest in each other's education and career, which has long-term benefits for both the couple and the State. Married people also enjoy better physical and psychological health and greater economic prosperity than unmarried persons.[2] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 962-63 (N.D. Cal. 2010).

In sum, States favor—and therefore encourage—marriage over transient relationships because marriage promotes stable family bonds, fosters economic interdependence and security, and enhances the well-being of both the partners and their children.[3] *Goodridge*, 798 N.E.2d at 954. All of these interests are furthered by allowing same-sex couples to marry, because same-sex couples are similarly situated to different-sex couples in all relevant respects. They

---

[2] Recent studies show that the availability of marriage to same-sex couples lessens psychological distress among gay, lesbian, and bisexual adults. *See* Richard G. Wight et al., *Same-Sex Legal Marriage and Psychological Well-Being: Findings from the California Health Interview Survey*, 103 Am. J. Pub. Health 339 (2013). Marriage equality also has led to decreased medical care visits, mental health visits, and mental health care costs for gay men. Mark L. Hatzenbuehler et al., *Effect of Same-Sex Marriage Laws on Health Care Use and Expenditures in Sexual Minority Men: A Quasi-Natural Experiment*, 102 Am. J. Pub. Health 285 (2012).

[3] Testimonials illustrating the positive effects of equality experienced by same-sex couples and their families are collected at https://www.facebook.com/events/1593045484264322.

form households, raise families, and support one another in all of the same ways.

Thus, this is *not* a case where the "inclusion of one group promotes a legitimate governmental purpose, and the addition of other groups would not." *Johnson v. Robison*, 415 U.S. 361, 383 (1974). Instead, the categorical exclusion of same-sex couples irrationally undermines the governmental interests otherwise advanced by marriage and harms the families who are left out.

II. NO LEGITIMATE STATE INTEREST JUSTIFIES EXCLUDING SAME-SEX COUPLES FROM MARRIAGE

Exclusionary laws fail to advance *any* legitimate state interest in marriage. Rather, prohibiting same-sex couples from marrying works against legitimate state interests, including promoting the well-being of children. To the extent States have an interest in "responsible procreation," it is not reasonably tethered to the exclusion of same-sex couples, and the remaining rationalizations for exclusionary laws—respecting the democratic process and preserving tradition—do not independently justify the exclusions. Accordingly, laws restricting marriage to different-sex couples cannot survive any level of constitutional scrutiny.[4] *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[E]ven the standard of rationality . . . must find some footing in the realities of the subject addressed . . . ."); *City of Cleburne v.*

---

[4] For the reasons set forth in petitioners' briefs, *see, e.g.*, *DeBoer* Br. 50-56, *Amici* States contend that laws that discriminate on the basis of sexual orientation should be subject to heightened scrutiny.

Cleburne Living Ctr., 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.").

A. Excluding Same-Sex Couples from Marriage Harms Their Children

All States share a paramount concern for the healthy upbringing of children and promote marriage in large part for that reason. Marriage improves the quality of children's lives in many ways:

> [M]arital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.

Goodridge, 798 N.E.2d at 956-57. Marriage improves children's well-being by honoring their parents' relationships and strengthening their families through, for example, enhanced access to medical insurance, tax benefits, estate and homestead protections, and the application of predictable custody, support, and visitation rules. *Id.* at 955-56. Children whose parents are married simply have a better chance of living healthy, financially secure, and stable lives.

Even putting these particular rights and protections aside, the very status of marriage is beneficial. Indeed,

parties and experts on both sides of this debate acknowledge that children benefit when their parents are able to marry. Studies have confirmed this view. For example, a Massachusetts Department of Public Health survey found that the children of married same-sex couples "felt more secure and protected" and saw "their families as being validated or legitimated by society or the government."[5]

The reverse is also true—excluding same-sex couples from marriage harms their children. As the Court recognized in *Windsor*:

> The differentiation [between relationships] demeans the couple . . . [a]nd it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Windsor, 133 S. Ct. at 2694 (citation omitted). Thus, exclusionary marriage laws do not encourage biological parents to raise their children together, but instead make it more difficult for a different set of

---

[5] Christopher Ramos et al., *The Effects of Marriage Equality in Massachusetts: A Survey of the Experiences and Impact of Marriage on Same-Sex Couples*, The Williams Institute, May 2009, at 9, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Ramos-Goldberg-Badgett-MA-Effects-Marriage-Equality-May-2009.pdf.

parents—same-sex couples—to provide their children with stable homes.[6]

Certain arguments in support of exclusionary marriage laws rely on the premise that different-sex couples make for better parents. The experience of *Amici* States and scientific consensus make clear that such arguments lack any basis. For many years, *Amici* States have protected the rights of gay men and lesbians to be parents.[7] It has been our experience that same-sex and different-sex parents provide equally loving and supportive households for their children. This experience is confirmed by scientific studies, which establish that children raised by same-sex couples fare as well as children raised by different-sex couples, and that gay and lesbian parents are equally fit and capable. The nation's most respected psychological and child welfare groups agree that same-sex parents are as effective as different-sex parents.[8] In addition, the two federal courts to have

---

[6] Many children raised by same-sex parents are raised by one biological parent and his/her partner. Refusing to allow these couples to marry will not increase the likelihood that the biological parent will marry his/her donor or surrogate.

[7] *See, e.g.*, *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 637 (N.Y. App. Div. 1978) ("homosexuality, per se, did not render [anyone] unfit as a parent"); *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) ("homosexuality in and of itself is not a bar to custody or to reasonable rights of visitation").

[8] These organizations include the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, the American Psychological Association, the Psychological Association, the American

considered expert testimony both reached the same conclusion about the competence and ability of gay couples to raise children. *See DeBoer v. Snyder*, 973 F. Supp. 2d. 757, 770-72 (E.D. Mich. 2014) (finding "no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes'"); *Perry*, 704 F. Supp. 2d. at 980 ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted. The research supporting this conclusion is accepted beyond serious debate in the field of developmental psychology.").

Claims that children need "traditional" male and female parental role models, or that they necessarily benefit from being raised by two biological parents, similarly lack foundation. Such views are disconnected from the "changing realities of the American family," *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion), and reflect precisely the type of effort to codify gender-based stereotyping that this Court has repeatedly rejected.[9] Moreover, the combination of

---

Psychoanalytic Association, the National Association of Social Workers, the Child Welfare League of America, and the North American Council on Adoptable Children.

[9] *See, e.g.*, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-35 (2003) (finding unconstitutional codifications of stereotypes about women's greater suitability for or inclination to assume childcare responsibility); *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (rejecting "overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (striking down statute that presumed unmarried fathers to be unfit custodians).

factors that affect children's well-being—including the parents' relationship, their commitment to their children, and the social and economic resources available to the family—applies equally to children of same-sex and different-sex parents and regardless of whether one or both of the parents are biological parents.[10] *Perry*, 704 F. Supp. 2d at 980-81.

Withholding the protections of marriage from the children of gay and lesbian parents does not promote any cognizable state interest. Instead, it is in the States' interest, and to the benefit of all children, to promote the well-being of all these families alike.[11]

---

[10] Exclusionary laws also limit unnecessarily the number of households where adults can raise children together. For example, some States only permit co-adoption by legally married adults. Given the number of children under state supervision (nearly 400,000 nationwide), all States benefit from expanding the pool of willing and supportive parents. *See* U.S. Dep't of Health & Human Servs., AFCARS Report No. 21 (Sept. 29, 2014), http://www.acf.hhs.gov/programs/cb/resource/afcars-report-21.

[11] In *Loving*, the Court rejected similar arguments made in support of anti-miscegenation laws based on a concern for the well-being of children "who become the victims of their intermarried parents." Brief for Appellee, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), 1967 WL 113931, at *47-48. The basic argument made here—that children reared in families without both of their biological parents are "disadvantaged"—is not as extreme in its terms, but likewise attempts to justify discrimination based on a misguided view of children's best interests.

B. "Responsible Procreation" Does Not Justify Restricting Marriage to Different-Sex Couples

The suggestion that the government's primary interest in marriage stems from the biological potential to conceive a child is wrong. This focus on procreation unfairly "singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage." *Goodridge*, 798 N.E.2d at 962. It is also at odds with the full history of marriage in our country.

The potential to conceive has never been a prerequisite for marriage. *In re Marriage Cases*, 183 P.3d at 431. Nor has the inability to conceive been grounds for voiding a marriage. *See, e.g.*, *Lapides v. Lapides*, 171 N.E. 911, 913 (N.Y. 1930). Even States that presume infertility beyond a certain age for purposes of allocating property do not disqualify the infertile from marriage. *See, e.g.*, N.Y. Est. Powers & Trusts Law § 9-1.3(e) (women over age 55); 765 Ill. Comp. Stat. 305/4(c)(3) (any person age 65 or older). Individuals who are not free to share physical intimacy with a spouse (prisoners, for example) have the right to marry. *Turner v. Safley*, 482 U.S. 78 (1987). Even parents who are "irresponsible" about their obligations to their children can marry. *Zablocki v. Redhail*, 434 U.S. 374 (1978). Moreover, this Court has recognized the autonomy to make personal choices about marriage and about procreation as distinct rights. *See, e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so

fundamentally affecting a person as the decision whether to bear or beget a child."); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

Exclusionary marriage laws are also irrationally under-inclusive. Insofar as excluding same-sex couples from marriage is intended to promote "responsible procreation," these laws do so in a manner that "[makes] no sense in light of how [they] treat[] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) (citing *Cleburne*, 473 U.S. at 447-50). Many different-sex couples either cannot procreate or choose not to, yet all States allow these couples to marry. If States licensed marriage *solely* to further an interest in protecting children conceived in sexual intimacy, then States would not permit marriages where one or both spouses are incapable of or unwilling to conceive or bear children. Instead, States license marriage to advance *many* important governmental interests, and thus allow couples to marry irrespective of their ability or intent to procreate.

Some theorize that extending marriage to include different-sex couples who lack the ability or desire to procreate nonetheless helps to preserve an essential social paradigm that encourages responsible procreation by promoting the "optimal" or "ideal" family structure. Even accepting the premise, it does not follow that allowing same-sex couples to marry will diminish the example that married different-sex couples set for their unmarried counterparts. Both different- and same-sex married couples can and do model committed, exclusive relationships, and both

establish stable families based on mutual love and support. Moreover, the modeling theory is "so attenuated" from the asserted interest in responsible procreation that it is arbitrary and irrational. *Cleburne*, 473 U.S. at 446.

C. Federalism Considerations Do Not Justify Discrimination

Principles of federalism do not require the Court to refrain from deciding the questions presented or to conclude that these marriage laws are constitutional. To be sure, the deference afforded States in the exercise of our traditional authority over domestic relations is critical to the balance struck by our federal system. But state authority is bound by constitutional guarantees. Insofar as some suggest that enactments of state voters and legislatures regarding marriage should be afforded some additional measure of deference in the rational basis analysis, this Court's decisions instruct otherwise.

The Court has made clear that the electorate may not, by any means, authorize government action that violates the Fourteenth Amendment, and that state and local governments "may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic." *Cleburne*, 473 U.S. at 448. In addition, notwithstanding the deference typically afforded under rational basis review, this Court has expressed skepticism where state laws, like these, target a particular group for exclusion or disfavored treatment. *See Windsor*, 133 S. Ct. at 2694 (laws whose "principle purpose is to impose inequality" raise "a most serious question under the [Constitution]"); *Romer v. Evans*,

517 U.S. 620, 633-35 (1996) ("status-based enactment" at issue required "careful consideration" to determine whether it was "obnoxious to the constitutional provision") (citing *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

It is no answer to suggest, as the court of appeals did, that the laws at issue in *Cleburne* and *Romer* were novel and thus less deserving of deference. *DeBoer v. Snyder*, 772 F.3d 388, 408 (6th Cir. 2014). Recent marriage bans, including the four at issue here, are also unusual. The bans either were unnecessary because they simply reinforced an exclusion that was *already* firmly entrenched in state law, or they reflect efforts by state voters and legislatures to make marriage restrictions explicit for the first time. In addition, as set forth in Part IV, *infra*, these bans are unusual in that they categorically disregard marriages lawfully licensed by other States. Moreover, the deference traditionally accorded to States on this subject is not proper when in so many States the political process leading to these bans was tainted by fear, prejudice, and misinformation. Att'y Gen. of Md., *The State of Marriage Equality in America* (2015) (surveying the political experiences of States with statutory and constitutional bans on same-sex marriage). Even if these "new" bans instead were motivated by "fear that the courts would seize control over an issue that people of good faith care deeply about," *DeBoer*, 772 F.3d at 408, that does not distinguish them from other laws this Court has found to serve no other purpose than to inflict harm. It is the role of the courts to make constitutional judgments, and a desire to avoid those judgments is not a

legitimate state interest, particularly when it comes to protecting minority rights.

The Court's decision in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), does not change the analysis. The will of the electorate is subject to the same constitutional guarantees and protections that circumscribe the power of state legislatures (and other state actors). Despite the substantial freedoms inherent in self-governance, "fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *see also Schuette*, 134 S. Ct. at 1667 (Sotomayor, J., dissenting) ("some things the Constitution forbids even a majority of citizens to do"). Moreover, *Schuette* put a very different question before the Court than do these cases. As Justice Kennedy explained in announcing the judgment of the Court, *Schuette* was not about "the constitutionality, or the merits, of race-conscious admissions policies in higher education."[12] *Id.* at 1630; *accord id.* at 1640 (Scalia, J., concurring). Rather, the question was whether, under the circumstances of the case, "sensitive" policy determinations about race-conscious admissions could be committed to the voters rather than state and other governmental entities. *Id.* at 1629-30 (Kennedy, J.); *see also id.* at 1638 ("This case is not about how the debate . . . should be resolved. It is about who may resolve it."). Here, the question is

---

[12] A majority of the justices did not necessarily view the state constitutional amendment at issue as excluding or inflicting harm on certain citizens as compared to others. 134 S. Ct. at 1637-38; *see also id.* at 1639-48 (Scalia, J., concurring), 1649-51 (Breyer, J., concurring).

not whether voters are permitted to define marriage, but rather whether it is rational for a State—regardless of the process or mechanism used to enact the law—to exclude an entire class of citizens from marriage.

Finally, the Court's ruling in *Windsor*, that the federal government may not define marriage to exclude same-sex couples for purposes of federal law, does not foreclose a ruling that exclusionary state-level definitions are also unconstitutional. Nothing in *Windsor* disturbed this Court's authority to determine whether state marriage laws conflict with the Constitution. *Windsor* simply resolved a dispute about Congress's authority to define marital status and affirmed long-standing precedent that marriage policy should be left exclusively to the States. Indeed, in discussing States' traditional authority over marriage, the Court repeatedly reminded that state power is "subject to constitutional guarantees." *Windsor*, 133 S. Ct. at 2692. These constitutional guarantees compel the conclusion that same-sex couples must be included in the institution of marriage.

D. Tradition Alone Cannot Save Discriminatory Laws

The Constitution also cannot countenance preserving laws that discriminate against same-sex couples solely for tradition's sake. While it is true that, until relatively recently, States licensed marriages only between a man and a woman, this Court has made clear that tradition alone cannot justify the continuation of an irrational legal rule. *Heller*, 509 U.S. at 326 ("Ancient lineage of a legal concept does not give it immunity from attack for lacking a rational

basis."). Claims that preserving the historical definition of marriage is necessary to avoid debasing civil marriage attempt to preserve, for its own sake, one long-held view of what marriage means. This Court has rejected the argument that a prevailing social or moral conviction, without more, justifies upholding a law:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

Lawrence v. Texas, 539 U.S. 558, 577-78 (2003) (internal quotation marks omitted).

To survive constitutional scrutiny, marriage laws must be reasonably tethered to a legitimate governmental interest that is independent of the disadvantage imposed on a particular group. *See Romer*, 517 U.S. at 633 (discriminatory classification must serve an "independent and legitimate legislative end"); *see also Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring). The marriage bans at issue here simply are not. That they may continue a long tradition of exclusion is not enough to sustain them.

III. EQUALITY DOES NOT THREATEN THE INSTITUTION OF MARRIAGE

Amici States have seen only benefits from marriage equality. Including same-sex couples does not fundamentally alter the institution or threaten the oft-cited markers of its strength—marriage, divorce, and

birth rates. Nor does equality threaten States' ability to otherwise regulate marriage.

A. Allowing Same-Sex Couples to Marry Does Not Fundamentally Alter the Institution of Marriage

Some argue that the extension of marriage to same-sex couples amounts to a "redefinition" of marriage that fundamentally alters the nature of the institution by severing its connection to procreation. They worry that this change will erode the role of marriage in our society, causing fewer marriages and more children raised by unmarried parents. These and other similar concerns are unsupported by history, have no footing in the actual experience of *Amici* States, and demean gay and lesbian couples.

Over the last two centuries, societal changes have resulted in corresponding changes to marriage eligibility rules and our collective understanding of marital roles by gradually removing restrictions on who can marry and promoting spousal equality. *See, e.g.*, *Goodridge*, 798 N.E.2d at 966-67 ("As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm."). Indeed, many features of marriage taken for granted today were once unthinkable. For example, until relatively recently, wives ceded their legal and economic identities to their husbands in marriage. *See, e.g.*, *United States v. Yazell*, 382 U.S. 341, 342-43 (1966) (applying law of coverture). Divorce and remarriage were also difficult, if not impossible, in early America. And fewer than 50 years ago, a third of the States continued to prohibit and punish interracial marriages. *Loving*, 388 U.S. at 6.

Civil marriage has endured as a bedrock institution due to its ability to evolve in concert with social mores and constitutional principles. This Court has repeatedly intervened to remove barriers to marriage because of its foundational position in our legal system—including by protecting the rights of those whom many have considered "undeserving" of the right to marry (or remarry). *See Turner*, 482 U.S. 78 (protecting right of inmates to marry); *Zablocki*, 434 U.S. 374 (protecting right of persons with unfulfilled child support obligations to marry); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (protecting right of indigent spouses to obtain a divorce). Allowing same-sex couples to wed is a movement toward equality—not a "redefinition" of marriage—and is consistent with prior decisions by this Court ensuring that individuals have "freedom of choice in an area in which we have held such freedom to be fundamental." *Zablocki*, 434 U.S. at 387.

Moreover, the fear that allowing same-sex couples to marry will fundamentally undermine marriage and our social order—by causing fewer different-sex couples to marry, more of them to divorce, or more children to be raised in nonmarital households—is unwarranted. "Marriage is incentivized for naturally procreative couples to precisely the same extent regardless of whether same-sex couples . . . are included." *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1291 (N.D. Okla. 2014). These fears obscure the reality that many gay and lesbian couples are already raising children,

and that allowing them to marry would, in fact, enable *more* children to grow up in married households.[13]

In any event, the experience of *Amici* States should put such fears to rest.[14]

Marriage Rates: In contrast to a pre-existing national downward trend, overall marriage rates in States that permit same-sex couples to wed have improved. Marriage rates immediately increased in all seven States for which data is available (Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire, New York, and Vermont).[15] In six of those States, the marriage rate in 2011 remained at or above the rate during the year preceding marriage equality.[16] (For example, in Connecticut, the rate was 5.5 marriages per 1,000 people in the population in both

---

[13] U.S. Census Bureau, *Characteristics of Same-Sex Couple Households: 2013*, http://www.census.gov/hhes/samesex/.

[14] Actual experience should carry substantially more weight in the analysis than bare surmise and conjecture. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 228-29 (1982) (rejecting unsupported hypothetical justifications for law excluding undocumented children from public schools); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("[P]arties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational . . . .").

[15] Centers for Disease Control & Prevention ("CDC"), National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf [hereinafter CDC Marriage Rates].

[16] *Id.* The six States were Connecticut, the District of Columbia, Iowa, Massachusetts, New York, and Vermont.

2007 and 2011). Nor have marriage equality States seen a dramatic decrease in the rate at which different-sex couples in particular marry. In some, the number of different-sex marriages increased in the years following the State's recognition of same-sex marriages.[17]

Divorce Rates: Marriage equality States have not experienced increased rates of divorce. Six of the seven jurisdictions that permitted same-sex couples to marry as of 2011 had a divorce rate that was at or below the national average. Four of the ten States with the lowest divorce rates in the country in 2011 were marriage equality States.[18]

Nonmarital Births: Marriage equality has not led to an increase in nonmarital births. Massachusetts's nonmarital birth rate has been well below the national average for years, including after same-sex couples began to marry. In 2013, 12 of the 17 marriage equality States had lower percentages of births to

---

[17] Alexis Dinno & Chelsea Whitney, *Same Sex Marriage and the Perceived Assault on Opposite Sex Marriage*, PloS ONE, Vol. 8, No. 6 (June 11, 2013), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0065730.

[18] CDC, National Vital Statistics System, *Divorce Rates by State: 1990, 1995, and 1999-2011*, http://www.cdc.gov/nchs/data/dvs/divorce_rates_90_95_99-11.pdf; CDC, National Vital Statistics System, *National Marriage and Divorce Rate Trends*, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm. By contrast, States that exclude same-sex couples from marriage have some of the highest divorce rates in the country. *Id.*

unmarried mothers than the nationwide rate.[19] Nor has the national nonmarital birth rate spiked. To the contrary, while the nonmarital birth rate increased six-fold between 1940 and 2008, it fell from 51.8 births per 1,000 unmarried women in 2008 to 44.8 in 2013 (nearly 14%), a period during which a number of States first allowed same-sex couples to wed.[20]

Thus, far from diminishing or fundamentally altering the institution of marriage, *Amici* States' experience with marriage equality suggests that the institution is better off for it.

B. Allowing Same-Sex Couples to Marry Does Not Threaten States' Ability to Regulate Marriage

Amici States are sensitive to federal incursions into our traditional authority over the institution of marriage. However, we reject the contention that the constitutional obligation to license marriages between same-sex and different-sex couples alike threatens our ability to otherwise regulate marriage. States regulate entry into and exit from marriage to further many interests, none of which depends upon the ability to also limit the right to marry based on the gender of the spouses.

---

[19] CDC, *Births: Final Data for 2013, Supplemental Tables*, 64 National Vital Statistics Report No. 1, Table I-4 (Jan. 15, 2015), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01_tables.pdf.

[20] Carmen Solomon-Fears, Cong. Research Serv., R43667, *Nonmarital Births: An Overview* (2014).

States have legitimate interests in protecting public health and welfare. In furtherance of these interests, all States impose marriage regulations designed to ensure consent and protect against abuse and coercion. For example, to protect minors, all States impose minimum age qualifications. Many States also require third-party consent (often from a conservator or guardian) before issuing marriage licenses where mental capacity is at issue. In order to avoid a variety of negative public health outcomes, States also prohibit certain blood relatives from marrying.

Because of the significant benefits marriage accords to individuals and society, *see* Part I, *supra*, States have an interest in promoting the stability and solemnity of the marital contract. States impose a variety of regulations in furtherance of this interest. For example, many States impose waiting periods before applicants for a marriage license can actually marry.[21] To ensure the mutuality of obligations between spouses, States also deny marriage licenses where a would-be spouse is already party to another marriage.

None of these regulations is undermined by marriage equality, because they are all rationally related to legitimate state interests. Moreover, unlike bans on marriage between same-sex spouses, and consistent with the lessons of *Loving*, these regulations do not draw upon inherent personal characteristics that are otherwise unrelated to an individual's

---

[21] States likewise regulate divorce, including imposing residency requirements and waiting periods.

qualification for or ability to consent to marriage.[22] In *Loving*, the Supreme Court characterized Virginia's anti-miscegenation laws as "rest[ing] solely upon distinctions drawn according to race," and proscribing "generally accepted conduct if engaged in by members of different races." 388 U.S. at 11. Exclusionary marriage laws similarly—and unconstitutionally—restrict the right to marry by drawing distinctions according to gender and using that personal characteristic to define an appropriate category of marital partners.[23]

It is no defense to argue that restrictive marriage laws do not discriminate based on gender (or sexual orientation) because, in theory, men and women (including gay men and lesbians) have the same right to marry. Opponents of marriage between same-sex spouses are not the first to argue that "equal application" of a law's restrictions precludes a finding of invidious discrimination. In *Loving*, the government argued that because its anti-miscegenation laws

---

[22] Age restrictions, for example, bear on consent and are temporary. Consanguinity is not an inherent personal trait like race or gender, but instead exists only when an individual is considered in relation to a small number of other people. Marital status is likewise alterable.

[23] Although *Amici* States contend that sexual orientation discrimination, like gender discrimination, should be subject to heightened scrutiny, *see* note 4, *supra*, the Court need not reach that issue in order to identify a limiting principle. It is sufficient to distinguish exclusionary marriage laws from other legitimate regulations by the fact that they irrationally define and limit marriage eligibility based on an otherwise irrelevant personal characteristic (gender).

punished people of different races equally, those laws, despite their reliance on racial classifications, did not constitute discrimination based on race. 388 U.S. at 8. In reality, anti-miscegenation laws were designed to and did deprive a targeted minority of the full measure of human dignity and citizenship by limiting marital choices based on race. The laws at issue here would achieve a similar result. Laws preventing same-sex couples from marrying define and limit fundamental choice based on gender for no justifiable reason. This is the essence of invidious discrimination.

Without any rational basis, restrictive marriage laws prevent gay men and lesbians from fully realizing what this Court described as "one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Loving*, 388 U.S. at 12. Under any standard of review, this result is in clear conflict with our Constitution.

IV. NON-RECOGNITION INFLICTS UNIQUE INJURIES ON MARRIED SAME-SEX COUPLES NATIONWIDE

The second question presented in these cases—whether the Fourteenth Amendment requires recognition of marriages between same-sex couples lawfully licensed out-of-state—should be answered in the affirmative as well. Without advancing any legitimate state interest, categorical non-recognition imposes practical and dignitary burdens on same-sex couples (including those residing in *Amici* States) that no other married couples are required to bear. Historically, no other category of marriages has been targeted for non-recognition in this way. As a result, these laws have the purpose and effect of "impos[ing] a

disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S. Ct. at 2693. Thus, even if it were the case that States could refuse to license marriages between same-sex couples, the categorical non-recognition of out-of-state marriages is nonetheless unconstitutional.

A. Singling Out Same-Sex Couples for Non-Recognition Stigmatizes Them and Their Families

Today, States respect marriages validly licensed by other States almost universally.[24] William M. Richman et al., *Understanding Conflict of Laws* § 119 (4th ed. 2013). This is due not only to basic principles of comity, but also to an understanding that marital status is so fundamental that it should not change at the state line. *Kitchen v. Herbert*, 755 F.3d 1193, 1213 (10th Cir. 2014) ("[T]he fundamental right to marry necessarily includes the right to remain married.") (collecting authorities); *see also* Richman, *supra* § 119 ("[T]he validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state."). A marriage license thus

---

[24] Section 2 of the Defense of Marriage Act, 28 U.S.C. § 1738C, provides that no State is required to give effect to a same-sex marriage performed in or licensed by another State. The existence of this federal law does not change the constitutional analysis here, because Congress cannot authorize States to violate the Constitution.

"creates an instantly portable status" that distinguishes marriage from many other licensed activities. Mae Kuykendall, *Equality Federalism: A Solution to the Marriage Wars*, 15 U. Pa. J. Const. L. 377, 425 (2012).

In cases challenging the validity of out-of-state unions, state courts often recite the principle that marriages should be recognized, if valid where celebrated, unless doing so violates the clear public policy of the forum. Restatement (Second) of Conflict of Laws § 283(2) (1971). However, "the vast majority of courts have not used a public policy exception to invalidate their domiciliaries' out-of-state marriages." Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 Quinnipiac L. Rev. 61, 67 (1996). While States retain the authority to refuse recognition of certain strongly disapproved marriages (subject to constitutional guarantees), "the 'overwhelming tendency' is to validate marriages . . . ." Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. Pa. L. Rev. 2143, 2148 (2005) (footnote omitted).

Historically, interstate recognition has not been uniform, but categorical non-recognition of classes of marriages is highly unusual.[25] *See id.* at 2148-49; Cox, *supra*, at 66-67. The analysis conducted by state courts

---

[25] To the extent there has been any uniformity in the case law, it has been a rejection of international bigamous marriages. But no State has ever sanctioned polygamy, making the comparison to same-sex marriage attenuated.

usually has been case-specific, so as to weigh equities and avoid unfair results. *See Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 Harv. L. Rev. 2028, 2036-37 (2003) ("[C]ourts have often been swayed to recognize 'offensive' marriages on equitable grounds when nonrecognition would result in injustice.").

Even when there was fierce disagreement between States over interracial marriage, for example, statutory prohibitions specifically denying recognition to out-of-state interracial marriages were uncommon, *see* Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 Quinnipiac L. Rev. 105, 120 (1996), and state courts did recognize some out-of-state unions. *See, e.g.*, *Whittington v. McCaskill*, 61 So. 236, 237 (Fla. 1913) (recognizing validity of interracial marriage despite forum prohibition where parties were previously domiciled and married elsewhere); *see also Miller v. Lucks*, 36 So. 2d 140, 141-42 (Miss. 1948) (same); *Succession of Caballero v. Executor*, 24 La. Ann. 573, 574 (1872) (same). Thus, the current categorical refusal by some States to recognize marriages between same-sex couples validly licensed in other States is exceptional as compared to both modern and historical norms.[26]

---

[26] Outside the context of marriage, many other state-conferred statuses are generally respected across State lines. For example, corporations formed in one State are universally recognized in all others. *See* Restatement (Second) of Conflict of Laws, *supra* § 297 ("Incorporation by one state will be recognized by other states."). Both States and the federal government ensure that parental status is given effect across state lines. *See* Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A. In addition, when traveling, an

In addition to being unusual, categorical non-recognition of same-sex marriages fails to advance any legitimate state interest. To the extent that the arguments in favor of withholding recognition of out-of-state marriages rest on the same reasoning as arguments concerning licensing of marriages, they likewise do not stand up to scrutiny in this context. If anything, disrespect for *existing* marital contracts is so untethered from any legitimate state interest that it is more suggestive of discriminatory motive. To the extent that non-recognition is justified as furthering a separate interest in avoiding so-called "evasive" marriages, the categorical nature of the non-recognition is so over-inclusive as to render it both arbitrary and irrational.[27] *See Cleburne*, 473 U.S. at 446. State laws categorically barring recognition of marriages between same-sex couples affect not only couples who travel to get married, but also many couples residing for long periods of time in the States that licensed their marriages, including couples raising families together. In addition, the unequal recognition of same-sex marriages across the country itself suffers from the constitutional infirmity of conferring a "second-tier" status for its own sake. *Windsor*, 133 S. Ct. at 2694-95. The mere existence of state laws singling out these marriages for non-recognition

---

individual's state driver's license generally is recognized as valid throughout the country.

[27] Several States have enacted general anti-evasion laws to prevent their domiciliaries from crossing state lines to obtain marriage licenses otherwise unavailable to them in their home States. These laws are now disfavored. *See* Peter Hay et al., *Conflict of Laws* § 13.13 (5th ed. 2010).

"instructs . . . all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696.

B. The Practical Consequences of Non-Recognition Are Substantial

The categorical refusal by many States to recognize out-of-state marriages between gay and lesbian couples also imposes burdens on these couples that no other married couples are required to bear.

Life today is rarely confined to one State. People move residences approximately 12 times, on average, over the course of their lives.[28] They travel throughout the country and beyond. They often leave their home States for work and school. In New York, for example, approximately 234,000 residents commute to jobs in other States.[29] This past fall, out-of-state students comprised more than one-fifth of the University of California's entering class.[30] Individuals work in one State for companies headquartered in another. Many families also have members who reside in multiple other States. Given this complex geography of modern

---

[28] U.S. Census Bureau, *Calculating Migration Expectancy Using ACS Data*, https://www.census.gov/hhes/migration/about/cal-mig-exp.html.

[29] Brian McKenzie, *Out-of-State and Long Commutes: 2011*, U.S. Census Bureau, 1 (Feb. 2013), http://www.census.gov/hhes/commuting/files/2012/ACS-20.pdf.

[30] Larry Gordon, *A Record Number of Out-of-State Students Brings Windfall for UC System*, L.A. Times (Aug. 18, 2014, 1:11 AM), http://touch.latimes.com/#section/-1/article/p2p-81109756.

lives, non-recognition profoundly affects married couples nationwide. Below are some examples of the harms.[31]

Adoption: As a general matter, married same-sex couples (even those living in marriage equality States) go through adoption proceedings to ensure that both spouses have legal rights regarding their children. Many consider this necessary, even when children are born into the marriage, because of the dangers that may come to pass if a family relocates or travels to a non-recognition State without both spouses established as legal parents. For example, if a child is injured, hospitals may refuse visitation to the non-legal parent. In addition to the time and expense involved in the adoption process, complications can still arise for these families. If the adopted child was born in a non-recognition State, then amendment of the birth certificate to include both spouses is likely impossible. As a result, parents must produce adoption papers rather than a birth certificate in circumstances in which they need to establish parentage. Beyond being cumbersome, it requires them to identify themselves as adoptive parents when they might otherwise have chosen not to do so. Different-sex couples never face this choice.

Employment Benefits: Many employers have self-insured benefit plans that refuse coverage to same-sex spouses. Because the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*,

---

[31] These harms are intensely personal. A number of individual stories have been collected at https://www.facebook.com/events/1593045484264322.

preempts state anti-discrimination laws, employers have substantial leeway in defining eligibility for benefits so long as they comply with federal law. Relying on the argument that the lack of an explicit prohibition on sexual orientation discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, permits differential treatment of same-sex spouses, and the fact that federal law currently does not require recognition of same-sex marriages, some companies deem same-sex spouses ineligible for coverage (even if the employee lives in a marriage equality State).[32] This exclusion also extends to Consolidated Omnibus Budget Reconciliation Act (COBRA) benefits following the termination of employment. 29 U.S.C. §§ 1161 *et seq.* In addition to the overt discrimination involved in the explicit refusal to recognize same-sex spouses, the inability to secure coverage through an employer can impose a significant financial burden on families, who must obtain insurance coverage through other means. Requiring recognition likely will end employers' exclusion of same-sex spouses from coverage.

Real Property: Couples who jointly own property in non-recognition States are required to file income tax returns separately, if they obtain income from the properties. They are not permitted to own property as tenants by the entirety (a status typically available to lawfully married spouses), and in the case of divorce,

---

[32] *See, e.g., Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *5 (W.D. Wash. Sept. 22, 2014) (Delaware corporation denied health insurance coverage to same-sex spouse of Washington employee because "its plan defined marriage as between one man and one woman").

may experience difficulty disposing of or dividing the property.

Relocation and Travel: For same-sex couples, non-recognition can prove a significant impediment to making important life decisions and to exercising their fundamental right to move between States. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("[T]he 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence.") (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). The portability (or lack thereof) of one's marital status can significantly influence a decision to relocate for a job, educational opportunity, or familial need. Individuals sometimes refuse transfers within their companies, if it means moving to a non-recognition State. Graduate students pursuing new careers often limit their job searches in order to avoid the rejection of their marriages. This hurts their careers and can negatively impact employers who are seeking qualified candidates from a national pool. In other circumstances, a sick parent or relative may require care in another State, but concern for loss of marital status may dissuade individuals from relocating, potentially placing greater stress on relatives or burdening the family's financial resources. In sum, many married couples refuse to consider the possibility of relocating to a non-recognition State due to the legal uncertainties it creates and the personal harm they suffer when their marriages are rejected.

When same-sex couples do travel into non-recognition States (even temporarily), they have many concerns about how their lack of marital status might affect them. For some couples, the fear of uncertain

status means avoiding non-recognition States whenever possible. For others, it means cumbersome planning and precautions. These concerns are particularly acute in the healthcare context, including decision-making and visitation, should one spouse fall ill or be injured in a State that does not recognize his or her marriage. Some couples fear traveling without extensive documentation to establish their rights.

Divorce: There is also uncertainty as to what happens to a married same-sex couple that wishes to divorce when one or both spouses have relocated to a State that does not honor the marriage in the first place. State courts have reached varying conclusions on whether they have jurisdiction to resolve such matters. *See, e.g.*, *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011) (finding jurisdiction); *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654 (Tex. App. 2010) (finding lack of jurisdiction). Though not a preferred outcome, divorce allows for an orderly dissolution of the union, divides marital assets, and can protect children by protecting the role of each parent. If this process is unavailable, both the spouses and their children are harmed. No other group of married couples suffers such uncertainty.

Death: If a same-sex spouse dies in a non-recognition State, the surviving spouse is not listed on the death certificate. This imposes dignitary harms on the survivor, who suffers not only the loss of a spouse but also the rejection of the marriage on official documentation used in the administering of the spouse's estate. If the spouse's death was caused by an accident, the surviving spouse may be unable to secure benefits or proceeds from a wrongful death action. In

another affront to the dignity of same-sex spouses, non-recognition States also may refuse to honor their burial wishes.[33]

In all of these ways, and more, the fact that many States refuse to recognize marriages between gay and lesbian couples inflicts a unique set of harms on these couples nationwide, including those living in States that honor their marriages.

* * *

Recognition, however, is not enough. Requiring States to recognize (but not license) marriages between same-sex couples would force many couples to choose between leaving home to marry—and perhaps not being able to celebrate their vows in front of their friends, family, and community—or forgoing marriage altogether. The choice alone is demeaning. And for many couples who lack the financial and other resources to leave home to get married, there really is no meaningful choice at all. Thus, anything short of full and equal marriage rights would perpetuate the stigma and second-tier status that gay and lesbian couples currently experience. The Court should answer both questions presented here in the affirmative. The time has come for marriage equality nationwide.

---

[33] *See, e.g.*, Complaint at 2-3, *Taylor v. Brasuell*, No. 1:14-CV-00273 (D. Idaho filed July 7, 2014) (describing denial of request for interment of same-sex spouses' ashes at Idaho State Veterans Cemetery).

CONCLUSION

For the forgoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

MAURA HEALEY
Attorney General

JONATHAN B. MILLER*
GENEVIEVE C. NADEAU
Assistant Attorneys General
AMANDA R. MANGASER
Special Assistant Attorney General
COMMONWEALTH OF MASSACHUSETTS
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200
Jonathan.Miller@state.ma.us
* *Counsel of Record*

Dated: March 6, 2015